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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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|---------------------------------------|---|---------------------|
| Monica Mejia, |) | CV 11-01140-PHX-FJM |
| |) | |
| Plaintiff, |) | ORDER |
| |) | |
| vs. |) | |
| |) | |
| GMAC Mortgage LLC; Executive Trustee) |) | |
| Services LLC, |) | |
| |) | |
| Defendants. |) | |
| |) | |

The court has before it defendants' motion for summary judgment (doc. 26) and separate statement of facts ("DSOF") (doc. 27), plaintiff's response (doc. 32), and defendants' reply (doc. 35). We also have defendants' motion to strike plaintiff's response to the motion (doc. 34). Plaintiff did not respond to the motion to strike and the time for responding has expired.

I

When considering a motion for summary judgment we accept undisputed facts as true and review disputed facts in the light most favorable to the non-moving party. Anthoine v. N. Cent. Cntys. Consortium, 605 F.3d 740, 745 (9th Cir. 2010).

On May 21, 2008, plaintiff received a loan of \$172,296 to purchase a home in Avondale, Arizona. Plaintiff signed a Note, promising to repay the money. The loan was secured by a Deed of Trust, which was executed by plaintiff and recorded with the Maricopa

1 Although plaintiff lists nine numbered facts in the body of her response to the motion,
2 she did not include a separate controverting statement of facts or citations to those facts as
3 required by LRCiv 56.1(b) and LRCiv 56.1(e). Defendants move to strike plaintiff's
4 response in its entirety on this basis, but LRCiv 7.2(m) prohibits a motion to strike under
5 these circumstances. Instead, we may simply consider any fact asserted by defendants that
6 is not addressed by plaintiff as undisputed for the purposes of this motion. Fed. R. Civ. P.
7 56(e)(2). Similarly, any disputed fact that plaintiff does not support with admissible evidence
8 is insufficient to defeat summary judgment. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.
9 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory
10 allegations unsupported by factual data."). Defendants' motion to strike is denied.

11 III

12 Defendants first argue that plaintiff's wrongful foreclosure claim fails as a matter of
13 law because it is not a recognized cause of action in Arizona. Defendants are correct.
14 Arizona has not recognized wrongful foreclosure as a cause of action, and it is not the federal
15 courts' place to implement a "trailblazing initiative[]" under state law. Cervantes v.
16 Countrywide Home Loans, Inc., 656 F.3d 1034, 1043 (9th Cir. 2011) (citation omitted).
17 Even if Arizona recognized this cause of action, the undisputed facts show that plaintiff
18 cannot prevail on her wrongful foreclosure claim. The states that recognize the tort of
19 wrongful foreclosure do so based on claims that a lender foreclosed when there was no
20 default or procedural discrepancies that caused the borrower to incur damages. Id. at 1043-
21 44. Plaintiff argues that defendants are liable for wrongful foreclosure because they refused
22 to accept her December 2009 payment, and thus plaintiff was not in breach or default of her
23 mortgage. Defendants presented evidence that plaintiff's loan was in default beginning
24 December 1, 2009, and that plaintiff's home was sold because of this default. Plaintiff,
25 however, does not provide any evidence that she attempted to pay her mortgage in December
26 2009 or that her payment was rejected by defendants. Her allegation that she was not in
27 default, unsupported by any evidence, does not raise a genuine issue of material fact. Taylor,
28 880 F.2d at 1045. Thus, even if Arizona recognized wrongful foreclosure as a valid claim,

1 which it does not, plaintiff has not shown that she was either current on her loan payments
2 or that she suffered any damages. See Cervantes, 656 F.3d at 1043-44 (amending complaint
3 to state a claim for wrongful foreclosure would be futile, for even if Arizona recognized this
4 cause of action, plaintiff homeowners were in default and did not allege damages). Summary
5 judgment is granted to defendants on the wrongful foreclosure claim.

6 Next, defendants argue that plaintiff's claim for "bad faith business practice" fails
7 because it is not a recognized tort in Arizona. We agree, and plaintiff does not respond to
8 this argument. Summary judgment is granted to defendants on the bad faith business practice
9 claim.

10 According to defendants, they are entitled to judgment as a matter of law on the
11 negligence claim because it is barred by the economic loss doctrine. In most instances, the
12 doctrine precludes a tort action for economic loss that does not involve physical injury to
13 people or property. Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance, Inc., 223 Ariz.
14 320, 323, 223 P.3d 664, 667 (2010). Plaintiff argues that GMAC, as a contractual party to
15 the Note, owed her a duty, which it breached by failing to accept her December 2009
16 payment. Plaintiff has not presented any evidence that she suffered physical injury as the
17 result of the alleged breach of duty. Thus, her negligence claim against GMAC is barred by
18 the economic loss doctrine. See id. Moreover, plaintiff has presented no evidence to
19 corroborate her contention that she tended payment in December 2009. Thus, even if the
20 economic loss doctrine did not operate to bar plaintiff's negligence claim, GMAC would still
21 be entitled to summary judgment. And plaintiff has not argued that defendant Executive
22 Trustee Services owed her any duty. Summary judgment is granted to both defendants on
23 the negligence claim.

24 Finally, defendants argue that plaintiff's quiet title claim fails because she has not
25 offered to pay the balance of her loan. In Arizona, quiet title is not available to a homeowner
26 until the loan debt is paid or offered to be paid. Farrell v. West, 57 Ariz. 490, 491, 114 P.2d
27 910, 911 (1941); see also McIntosh v. IndyMac Bank, FSB, CV-11-1805-PHX-GMS, 2012
28 WL 176316, at *4 (D. Ariz. Jan. 23, 2012) (quiet title remedy unavailable unless a

1 homeowner plaintiff has paid off or is willing and able to pay the full amount of the
2 mortgage). Plaintiff does not dispute defendants' argument, and there is no evidence that
3 plaintiff paid off or is able to pay off her loan. We grant summary judgment to defendants
4 on the quiet title claim.

5 **IV**

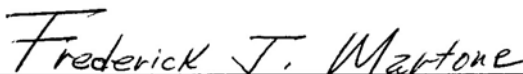
6 Plaintiff asks to amend her complaint if we grant defendants' motion. Our Rule 16
7 scheduling order set a deadline of September 16, 2011 for motions to amend the complaint
8 (doc. 18). Five months have passed since that deadline, the dispositive motion deadline has
9 passed, and a firm trial date is set for June 19, 2012. Amending the complaint at this late
10 juncture would require a modification of the scheduling order. Scheduling orders "may be
11 modified only for good cause." Fed. R. Civ. P. 16(b)(4). Plaintiff has not shown any cause,
12 let alone good cause, to modify the scheduling order. Plaintiff's request to amend her
13 complaint is denied.

14 **IT IS ORDERED DENYING** defendants' motion to strike (doc. 34).

15 **IT IS ORDERED GRANTING** defendants' motion for summary judgment (doc. 26).

16 The Clerk shall enter judgment.

17 DATED this 9th day of March, 2012.

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20 Frederick J. Martone
21 United States District Judge
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